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No. 96-1925

In the Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR INC.,
Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated LOCAL UNION 786,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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The arguments of the UAW and its *amici* are founded upon a series of erroneous premises:

A. The "Practice" of Employers Paying the Wages of Full-Time Union Officials Is Neither Common Nor Longstanding

The UAW and *amici* create the impression that payment by employers of full-time union officials to serve as full-time union officials is a "common," "longstanding," "pervasive" and "typical" practice. They do so by continuing to conflate the concept of, and the precedent for, "not docking" active employees who perform representational duties on an "as needed" basis with the payment of wages to full-time union officials at issue in this case.

What the various materials cited by the UAW do show is that while the War Labor Board may have allowed active employees time off to serve as grievance handlers as needed during the war effort and while the auto industry and the UAW apparently have silently pursued the practice of paying "full-time" grievance handlers, this latter practice has rarely been adopted elsewhere. The multi-union/industry AFL-CIO has identified no other industry to which the practice has spread (with the exception of the auto-patterned "ag-imp" industry). Existing case law involving the transit (*Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (CA3 1986)), communications (*Communications Workers of Am. v. Bell Atlantic Network Services, Inc.*, 670 F.Supp. 416 (D.D.C. 1987)) and steel (*Toth v. USX Corp.*, 883 F.2d 1297 (CA7 1989) & *United States v. Phillips*, 19 F.3d 1565 (CA11 1994)) industries shows no practice of paying wages to full-time union representatives, but merely some attempts to provide continued participation in various jointly administered benefit plans.

The UAW suggests without record support, for both the auto industry and "manufacturing generally," that full-time pay provisions have been an integral part of successful grievance and arbitration procedures and have been widely adopted.[1] UAW Br. at 13. In reality, according to the 1950 Bureau of Labor Statistics (hereinafter "BLS") study cited by the UAW, such pay practices were *not* widespread at all:

> A *few* agreements covering large plants provide for a designated number of representatives to devote full time to grievance work. Usually, however, *only time actually spent on grievance work is paid* by the employer. . . . Where the time allowance is on a daily basis, the representative is sometimes allowed to average the time over a week or longer period, since the time consumed by grievance work may vary greatly from day to day.

Bureau of Labor Statistics, *Collective Bargaining Provisions: Grievance and Arbitration Provisions* (Bulletin No. 908-16) at 59 (1950) (emphasis added).[2]

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[1] The UAW also erroneously suggests that Dean Shulman's 1944 arbitration award supports its contention as to why such pay practices were adopted. *See* UAW Br. at 13. In fact, the quotation attributed to Dean Shulman represented no judgment on his part, nor did it even suggest that such practices were widespread or even preferable. Shulman merely noted that while "many unionists" believed that unions should compensate stewards or committeemen for time handling grievances, other "newer unions . . . especially the UAW (CIO)," had adopted a different approach based on the philosophy quoted by the UAW in its brief. *Ford Motor Co.*, Opinion A-124 (1944), *reprinted in* H. Shulman & N. Chamberlain, *Cases on Labor Relations* at 24 (1949).

[2] Similarly, the 1944-45 BLS study cited by the UAW regarding the prevalence of pay practices of "employee-union" representatives nowhere suggests that the individuals being described were full-time representatives. In fact, the accompanying discussion regarding requirements that "union representatives . . . report to their foreman before leaving work to handle grievances" and

(continued...)

Building on its conflation of concepts, the UAW points to a 1980 BLS study as proof that the "trend" started in 1941 became "integral" to "industrial workplaces." UAW Br. at 15. Once again, the UAW points to a study which, in fact, clearly distinguishes between compensation for part-time employee representatives and full-time union officials. Specifically, the 1980 BLS study makes clear that under the pay provisions discussed in the section of the study quoted by the UAW, the representatives in question were still "required to perform their regular jobs." BLS, *Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business* at 20 (1980). As for full-time union officials, the study reached a conclusion worlds away from that portrayed by the UAW:

> Company pay for employees on leave to hold full-time union positions *was rare*. A small portion of the clauses referring to such leave (under 1 percent) required the company to retain the union official on the payroll, or at least to assume a part of the payroll costs. . . .

Id. at 29 (emphasis added).

Thus, in the end, the alleged "fifty years of experience that belies Caterpillar's hypothesis" is not supported by any of the studies cited by the UAW.

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[2] (...continued)

other limitations on time spent investigating grievances demonstrates that the representatives discussed are more properly analogized to shop stewards. *See* BLS, *Grievance Procedures Under Collective Bargaining* at 184-85 (1946).

B. The "Practice" at Issue Is *Not* Simply "No Docking" for *Grievance Handling*. The Union Officials on Long-Term Leave of Absence Here Are Regularly Paid Full Wages for Virtually All Hours Except "Activity Not Directly Related to the Functions of Their Office"

The UAW and *amici* repeatedly attempt to create the impression that the full-time UAW officials here are mere grievance handlers and/or are only "not docked" their normal wages for such grievance handling work. Both the labor contract itself and the NLRB factual findings demonstrate otherwise.

1. *Labor Contract.* The "no docking" arrangement between Caterpillar and the UAW is contained in Article 2.2 of the Local Supplement. It provides:

> In taking Step 1 [of the grievance procedure], Stewards may, without loss in pay for regularly scheduled hours, discuss a grievance with the aggrieved employee (provided the aggrieved employee first informs his immediate Supervisor of his desire for such discussion), with the employee's immediate Supervisor and, if the grievance is not satisfactorily settled in Step 1, with the Plant Grievance Committeeman who would handle the grievance in Step 2.

J.A. at 44. An equivalent "no loss in pay" allowance is granted to the active worker who also serves as a *Plant* Grievance Committeeman *in grievance discussions. Id.*

The foregoing *is* unmistakably a *bona fide* "no docking" arrangement for active workers when engaged in actual grievance handling, fully consistent with § 8(a)(2) proviso and § 302. *It is not at issue.*

In stark contrast, the Central Agreement separately provides for ongoing wages of the full-time officials. J.A. at 13-15. While Article 4.6 listed certain "privileges" granted the "Chairman" (and his alternate), which relate primarily to handling grievances, the provision went on to provide for a "leave of absence" during which:

> The Chairman . . . shall conduct *his business* from the Local Union office. He . . . will be paid by the Company for his regular shift hours . . . provided, however, the Company shall not pay for time spent in (i) negotiations, (ii) vacations, (iii) attendance at meetings and/or conventions not held in the Local Union Office or (iv) *any activity not directly related to the functions of his office*.

J.A. at 14 (emphasis added). The difference is manifest; stewards and plant grievance committeemen are only to suffer no loss in pay during grievance discussions. The Chairman, on leave of absence, is paid for all functions of his office, except certain limited exceptions.

2. *Record Findings.* The record bears out this distinction in practice. The York Chairman, for example, was regularly paid virtually full salary, receiving 35 to 46 hours of pay in 70 percent of the weeks reported (which period *included* the extraordinary 1991-92 labor negotiations with which he was occupied and for which he was not to be paid). J.A. at 73-81. During this time, only between 79 and 140 grievances per year even reached his level[3] and he visited the plant only one day per week on average. Cir. App. at 188-89. As the NLRB administrative law judge noted, "chairmen spend substantial time away from their respective plants where what they do is unknown to [Caterpillar]."[4] Pet. App. at 77a. Thus, the ALJ concluded:

> While Charging Party seems to maintain that never do the chairman and committeemen do anything during

[3] 1990: 90 grievances reached Third Step; 1991: 79 grievances; 1992: 140 grievances. Cir. App. at 435.

[4] At the NLRB hearing, Orndorff admitted that Caterpillar "wouldn't know whether you were working on grievances or working on Union business or doing crossword puzzles or what." Pet. App. at 58a-59a.

> the work week than handle grievance and engage in contract administration, such is difficult to believe. These are elected officers of their respective local unions. They are among the leadership. *It is simply not credible that during their time at the local union hall, chairmen and committeemen never discuss matters of general union interest, including tactics and strategies involved in this labor dispute.*

Id. at 77a-78a (emphasis added).[5]

Thus, the ALJ likened the full-time committeemen to assistant union business agents in the construction or retail food industry. *Id.* at 76a. In short, the union officials at issue are simply *not* "in-shop grievance handlers."

C. The Departments of Justice and Labor Continue to Operate Under the Erroneous Belief that the Non-Textual Limitations They Would Engraft on the Statute Have Not *Already* Been Exceeded in Practice

The Departments of Justice and Labor continue to operate not only under the misconception that the UAW

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[5] The ALJ's conclusion was well justified. As Orndorff testified, the Grievance Committee and the Bargaining Committee of Local 786 are one in the same. Cir. App. at 601. As part of his duties as Chairman, he conducted training sessions for stewards and committeemen, *id.* at 609, and conducted Grievance Committee meetings. *Id.* at 631. Although the committeemen were not paid by Caterpillar for time spent in such meetings, Orndorff apparently was. *Id.* at 631, 641. In fact, Caterpillar paid for Orndorff's attendance at any meeting held at the Union hall. *Id.* at 641. Orndorff was apparently paid for the time he spent *preparing* for negotiations. *Id.* at 640-641. Caterpillar paid for his vacation and his other absences. *Id.* at 620, 622. When Orndorff and his assistant were absent from the hall, Caterpillar paid the wages of a committeeman who served as the full-time officer in their stead. *Id.* at 618; J.A. at 15. The UAW's claim that it was the Company's idea to have the Chairman based at the union hall is not true. *Id.* at 477.

officials at issue here are merely paid "grievance handlers," but also that the government can successfully engraft non-textual limits onto the statute as they deem fit.[6] As Caterpillar has already observed, none of these limits can be found anywhere in the statutory language or in its history. And, if the collective bargaining agreement *defines* what is payment "by reason of service as an employee," then positing limits is an exercise in wishful thinking.

The *reality* is that these and the other non-textual limits the government proposed before the Third Circuit (to no avail) are *already* being transgressed in *this* case and/or, apparently, in the auto industry:

(1) Full-time committeemen are not paid *just* to handle grievances. *See* Part B, *supra*.

(2) Full-time committeemen do participate in the negotiation of their own wages.[7]

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[6] Thus, the government apparently limits its approval of employer pay to union officials:

(1) for time spent handling grievance matters for other employers (DOJ/DOL Br. at 2);

(2) where the individual "is considered on a leave of absence by virtue of having been elected . . ." (*Id.* at 2);

(3) where payments are proportionate to employee's prior service (*Id.* at 13);

(4) where the representative handles grievance matters on a full time basis (*Id.*);

(5) by a person "not engaged principally" in union business "other than contract administration" (*Id*).; or

(6) where payments are not a "corrupt effort" to conceal "improper inducements." (*Id.*).

[7] Under Local 786 bylaws, Orndorff is a member of the bargaining committee and also served on the Central Bargaining Committee. Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 9; Cir. App. at 183-84, 629. Before

(continued...)

(3) While Caterpillar's full-time committeemen are elected, there is no such requirement in law or the UAW's constitution that all representatives be elected. For example, certain auto industry union representatives are appointed (*see infra* at pp. 9-10 & n. 12).

(4) Full-time committeemen can serve, and have served, for years and are paid regardless of how brief their prior employment may have lasted.[8]

(5) Full-time committeemen are not paid on the same basis as unit personnel, "proportionate" with service or "commensurate" with their regular wage. As of the Caterpillar's termination of this practice, UAW negotiators were already earning six additional hours of pay virtually each week and were demanding that various officials' compensation be increased further beyond that which they had earned as workers. The Union sought 54 hours of pay per week regardless of whether overtime was actually worked; a benefit, as the NLRB ALJ noted, not available to workers and paid regardless of whether workers were being awarded any overtime. Cir. App. at 84a. Moreover, these hours were to be paid at top rates and with premiums regardless of whether officials had attained

[7] (...continued)

the Third Circuit (*see* DOJ/DOL 3d Cir. Am. Br. at 28) the DOJ/DOL identified officials' participation in negotiation of their own wages and benefits as a reason for "close scrutiny." Before this Court, having learned the UAW fails the test, they have apparently dropped this caveat *without* explanation.

[8] Many committeemen have been on paid leave longer than they had been employed. Cir. App. at 168. Below, the government also called for "close scrutiny" where payments are made to an individual "who has not worked for the company for an extended period" and "is unlikely to return to such work." DOJ/DOL 3rd Cir. Am. Br. at 28. Here again, the government seems to have dropped its concern expressed below.

such levels during their former work lives. Cir. App. at 167-68.[9]

(6) The pay provisions for full-time committeemen are *not* "substantially similar," (DOJ Br. at 11) to no-docking provisions of the collective bargaining agreements. *Compare* Article 4.6 of Central Agreement *with* Article 2.2 of Local Supplement. J.A. at 14, 44.

As for the attribution of significance to the fact that a former employee-union agent from the bargaining unit (DOJ/DOL Br. at 4), was "experience[d]" and "aware of conditions in the workplace," nowhere does the government offer an explanation as to how these facts, or the absence thereof, could serve as a legitimate, statutory basis for assessing whether payment is lawful or unlawful. If such "experience" validates payments to "grievance handlers," then it is just as valuable to the employer to deal with "knowledgeable" international representatives, business agents and negotiators.

In short, *few* of the facts and circumstances in which the government purports to take such solace are true and *none* find any sustainable basis in the statute as criteria for assessing lawfulness.[10]

[9] The government continues to conveniently ignore the findings of its own administrative law judge who specifically found the special assumed "overtime" arrangement to be a discriminatory preference not available to rank and file employees. Pet. App. at 82a-85a.

[10] The government's new position that it does not seek remand because Caterpillar's failure to seek remand is "indicative that, on remand, Caterpillar would not adduce any additional evidence to suggest that the payments were illegal," DOL/DOJ Br. at 18, n. 10, is in error. Caterpillar obviously does not feel remand is necessary. If, however, this Court attributes significance to facts and circumstances beyond the material undisputed facts, then remand *is* called for. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982). Of particular importance, if the government's non-

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D. The AAMA Demonstrates How Far Afield the UAW's Open-Ended Interpretation of § 302(c)(1) Allows Contracting Parties to Wander

The DOJ/DOL might do well to read the AAMA's brief if the government wishes to be disabused of its belief that § 302(c)(1), as so construed, can be, or is being, limited to "elected grievance handlers." Originally, in the auto industry, committeepersons and chairpersons apparently were only paid to "investigate" and "handle grievances" and other "*in plant* activities pertaining to the administration of the National Agreement . . .", *See, e.g.,* Cir. App. 334, 365. Now, the Court is informed by the AAMA that it and the UAW have interpreted § 302(c)(1) to allow the auto companies to pay union representatives not just to administer the grievance procedure but to meet and confer with the employer (dare we say, "negotiate") regarding such issues as "health and safety," "fringe benefits," and "quality," "among others."[11] Apparently, they have concluded that they can pay union officials for such activities pursuant to § 302(c)(1), whether they are "elected" (as the government

[10] (...continued)

textual tests are deemed significant, Caterpillar is prepared to adduce additional proof as to the extent full-time committeemen were engaged in the negotiations of their own wages, paid regularly without regard to whether they were engaged in grievance handling and that Caterpillar had no way of knowing, let alone controlling, what, if anything, these officials were doing for their pay. Pet. App. at 58a-59a, 77a-79a.

[11] The phrase "among others" presumably can include a quantity of production. Consider, therefore, the following scenario: Union officials are *paid* by the employer, after having been *trained* by the employer (*see* AAMA Br. at 8), to convene a committee to discuss whether and ways in which production lines can be speeded up. Apparently, the union and the industry see no difficulty with such an arrangement.

presumes) *or appointed*,[12] by virtue of the Labor Management Cooperation Act of 1978, Pub. L. 95-524, 92 Stat. 1990 (hereinafter "LMCA") and its recognition in §302(c)(9) of the LMRA. *See* AAMA Br. at 2.

The LMCA, however, purports to encourage *worker*-management cooperation and a democratization of the workplace through *worker* involvement in the decision making affecting their daily work lives.[13]

It is not clear whether the "union representatives" referenced (AAMA Br. at 8) are elected or selected from the regular employee ranks just for a tour of duty on a particular project or study group, or if they are the type of plenary union official whose duties span the gamut of representational functions (or both). To the extent they are the latter, consider the result: Full-time union officials being "trained," *id.*, and then paid by the employer to supposedly represent the employees in *making* the decisions that will affect the workers' lives. Are opportunities for *worker* involvement being created or merely more occasions for employers to pay wages to union officials?

[12] *See, e.g.,* Cir. App. at 311-316.

[13] Thus, §6(b) of that Act states that its purpose is:

(2) to provide *workers* and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;

(3) to assist *workers* and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process; and

* * *

(5) to expand and improve working relationships between *workers* and managers. . . .

Pub. L. 95-524, 92 Stat. 1990 (emphasis added).

Worse still, consider the perversion of § 302(c)(9). That section was instituted to allow employers to provide *funding*, "money or other things of value . . . *to a plant*, area or industry wide labor management *committee* . . ."—*not* provide salaries to union officials.

If, of course, the UAW's interpretation of § 302(c)(1) is correct, then this further extension of wages to full-time union officials well beyond "grievance handling" is quite permissible. Indeed, thus construed, § 302(a) is rendered nugatory in the face of any "§ 302(c)(1) agreement" to pay *any* remuneration to *any* union officials who were previously in the employer's employ. In fact, the UAW makes no bones about it: "[T]he breadth of [§ 302(c)(1)] evinces an intent to cover [i.e., exempt], *without limitation*, the *universe* of bona fide remunerative payments made by an employer to its employees . . ." UAW Br. at 25 (emphasis added and in original). "*All bona fide remunerative payments* to employee-union representatives fall within this *broad exception*." UAW Br. at 8 (emphasis added).

The question remains: Did Congress *really* intend to allow employers to *pay* full-time union officials to represent their members with regard to matters of worker concern *whether* at the traditional bargaining table, *or* within these so-called "joint committee" frameworks or in the give and take of grievance meetings? It is so easy to be lulled into a belief that each incremental step must be permissible because it represents only a minor, almost imperceptible, progression. Yet one day the parties awake to find that the *ad hoc* "grievance handler" is a thing of the past. Instead, employer-"trained" and employer-paid full-time union officials predominate and these same union officials, who are not even based in the plant, are demanding 54 hours of pay each week at top rates because "its time they got a raise," Cir. App. at 167-68, and fully believing that there is absolutely nothing "wrong with this picture."

E. The Union's Analysis of Legislative History Rests Upon an Erroneous Premise as Well

The Union's analysis of legislative history rests on a faulty assumption—that employer payments to union representatives were perfectly legal before 1947. Upon this assumption, the Union would lead the Court on a search for evidence in 1947 that Congress intended to prohibit payments lawful before 1947. The evidence is in the legislative history of the 1935 Wagner Act, in which such payments were first banned.

Between 1935 and 1947, the NLRB had repeatedly concluded that employer payments to union representatives were permissible only if the payments satisfied the specific requirements of the lost-time proviso to § 8(2).[14] Although most of the unions at issue were also employer-dominated, the payments were unlawful even without such domination. Thus, the House correctly recognized in 1947 that employer

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[14] *See, e.g., Wyman-Gordon Co.*, 62 NLRB 561, 567 (1945), *enf'd*, 153 F.2d 480 (CA7 1946); *Wilson & Co.*, 31 NLRB 440, 455 (1941), *enf'd*, 126 F.2d 114 (CA7 1942), *cert. denied*, 316 U.S. 699 (1942); *Colorado Fuel & Iron Corp.*, 22 NLRB 184, 220-21 (1940), *enf'd*, 121 F.2d 165 (CA10 1941); *International Harvester Co.*, 2 NLRB 310, 353-55 (1936); *see also Axelson Mfg. Co.*, 88 NLRB 761, 776-77 (1950); *Carpenter Steel Co.*, 76 NLRB 670, 688 (1948); *cf. Remington Arms Co.*, 62 NLRB 611, 614 (1945) (no violation where payments conformed to proviso). In *Wyman-Gordon Co. v. NLRB*, *supra*, the Seventh Circuit rejected NLRB findings of domination but affirmed the conclusion that the employer had violated § 8(2), largely because payments to union representatives did not conform to the proviso. *Id.* at 482.

The NLRB expressly rejected contrary decisions of the War Labor Board and the Wage and Hour Administrator, on which the Union relies. *Axelson*, 88 NLRB at 777; *Wyman-Gordon*, 62 NLRB at 567.

payments not covered by the proviso were unlawful,[15] and the Senate insisted that § 8(2) remain unchanged because it *approved* of the existing ban, inserting only a nondiscrimination provision to ensure that ban was applied to affiliated unions. *See* S. REP. NO. 80-105, at 12 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 418.[16]

Because employer payments to union representatives were *already* prohibited, except as narrowly authorized in the lost-time proviso, they did not merit any special mention during the broader debate over § 302. The simple fact is Congress considered employer payments not covered by the proviso already unlawful in 1947 and in enacting § 302's broad ban, subsumed the preexisting ban and limited exception of § 8(2).[17]

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[15] H.R. REP. NO. 80-245, at 28-29 (1947), *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 319-20 (1985) [hereinafter LEG. HIST. LMRA]. The House sought to amend § 8(2) so as to *legalize* such payments, but the effort failed. The House proposed to allow any employer payments not motivated by an intent to corrupt the recipient union official. H.R. 3020, sec. 101, § 8(a)(2) (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 20-21. The Senate rejected the proposal, however, and added section 302, which also did not contain an intent element that would narrow the existing prohibition. Congress was also clearly aware of *Wyman-Gordon*. *See* H.R. REP. NO. 80-245, at 41, *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 332.

[16] Contrary to the Union's misleading suggestion (UAW Br. 35), the House Managers expressly acknowledged that the conference bill allowed employers to pay union representatives only for time spent conferring with management. H.R. REP. NO. 80-510, at 45, *reprinted in* 1 LEG. HIST. LMRA, *supra*, at 549.

[17] The Union has emphasized NLRB decisions *subsequent* to 1947, in which the Board relaxed its strict enforcement of § 8(a)(2)'s ban on any financial support in response to a series of losses in the Courts of Appeals. Those decisions obviously do not shed any light on what Congress was thinking in 1947. Moreover, the cases cited, at best, refer to not requiring "a practice of

(continued...)

F. By One Artifice or Another, the Union's and *Amici's* Construction of Section 302(c)(1) Continues to Tacitly Read the Nexus Requirement of the Provision Out of the Statute

At page 20 of its brief, the UAW misquotes the statute. Undoubtedly an inadvertence, it is a revealing, almost Freudian, misstatement. The Union there states that "it is undisputed that the payments . . . are lawful if 'payable . . . by reason of', the Grievance Chairman's 'service as an employee or former employee' of Caterpillar." That is *not* what the statute says. It *does* allow payments [to a former employee] for "service as an employee." It *does not* allow payments for "service as a *former* employee." And there most assuredly is a difference—a difference which highlights the sophistry afoot here.

The Union and *amici*, in the final analysis, would like to allow employers to pay former employees *for service as union officials*. But the statute *only* speaks to payments due and owing former employees *for service as employees*.[18] While paying for service of a former employee *to the union* may be an intriguing notion, it is not permitted by § 302(c)(1). Payments are permissible under § 302(c)(1) only if they are for or because of service the representative provides as a current employee or service he previously provided when he once was a current employee. A payment

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[17] (...continued)

docking *employees* for *brief periods* of time spent in conference . . ." *BASF Wyandotte Corp.*, 274 NLRB 978, 980 (1985).

[18] The text clearly contemplates the provision of service in two different capacities: as a union representative and as an employee of the employer. Section 302(c)(1) allows an employer to pay "any *representative* . . . , who is also an *employee* or former *employee*" for or because of "his service as an *employee*" After introducing both concepts, section 302(c)(1) allows pay only for service as an *employee*.

the representative receives from a past employer does not qualify under § 302(c)(1) if it is actually for or because of service he is currently providing for a new employer—to wit, the Union. The Union's problem here is that the full-time Committeemen are obviously being paid wages directly in exchange for services they are performing on a day-in and day-out, year-in and year-out basis *for the Union.*

All the Union's contortions suffer an obvious defect. Regardless of whether Congress intended to connote a difference between payments "by reason of" as distinct from payments "as compensation for" or whether Congress intended to address all payments "as compensation"—i.e, "compensation for" or "compensation . . . by reason of"—in *either* case, Congress only allowed for compensation (wage or non-wage) for "*service as an employee of such employer.*" The language is inescapable.

Beyond reading out the substantive nexus requirement of § 302(c)(1), the position espoused by the UAW continues to proliferate the most amorphous pronouncements of what § 302(c)(1) is really all about. Worse, no one seems to agree:

- The Departments of Justice and Labor first declare that § 302(c)(1) allows something called "non-compensatory payments" (whatever they are) (DOJ/DOL Br. at 14), and then admit that this will still entail an apparently case-by-case "additional inquiry" to *ensure* that the "noncompensatory payments" are by reason of "prior service" "rather than 'by reason of' *something else*."[19]

[19] How this case-by-case "additional inquiry" will occur is a mystery. Elsewhere the government observes that it does *not* require a reporting union to disclose the existence of payments to union officials pursuant to a collective bargaining agreement. (DOJ/DOL Br. at 19). The government thus has no way of knowing that an "additional inquiry" must be made. This is particularly perplexing (continued...)

- The government elsewhere declares that the "by reason of" language "requires more than that the payment would not be made 'but for' the recipient's status as an employee. DOJ/DOL Br. at 17. This, it should be noted, contradicts the government's position below where it argued that "the *critical issue* is whether the persons who receive payments *has ever been* in the 'service' of the employer." (DOJ/DOL 3d. Cir. Br. at 15). Be that as it may, the government now declares that "the payments [must] *reflect a connection* not simply to the status of being an employee but to one's 'service' as an employee" (DOJ/DOL Br. at 17). As to *what* that "connection" consists of, the government contradicts itself within two pages. First, it declares that inclusion in a collective bargaining agreement "has long been treated as significant . . ." (*Id.* at 18). Then, it declares that inclusion in a collective bargaining agreement "would amount to little more than a 'but for' test." *Id.* at 19.
- The AFL-CIO, on the other hand, proposes an interpretation of § 302(c)(1) where the test is whether the officials "were *chosen* to fill their positions 'by reason of [their] service as an employee of such employer.'" AFL-CIO Br. at 6. Thereafter, the AFL-CIO seems to attribute importance to whether the "employer or the employees *perceives* the compensation as *flowing* to the elected representative by virtue of their representational role, rather than by virtue of their status as employees as of the time they are chosen to serve." *Id.* at 19.
- AAMA's members don't seem to espouse any test at all. They just want to keep supplying money to "trained" union officials rather than rank-and-file personnel.

[19] (...continued)

because the government contends that "inclusion in a collective bargaining agreement does not end [the inquiry]." *Id.* It would seem in reality the "inquiry" never gets started at all.

All of this linguistic "double speak" reveals that, at the core, if § 302(c)(1) is not given its plain and straightforward meaning, then it ends up with no meaning at all.

G. The Full-Time Committeemen are Former Employees of Caterpillar and Current Employees of the Union

Despite the holdings of the District Court and the majority and dissenting opinions of the Third Circuit, the UAW continues to claim the full-time Committeemen are current employees of Caterpillar within the meaning of § 302(c)(1). The UAW cites *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971) as support for its claim.

Pittsburgh Plate Glass provides little, if any, support for the Union's argument.[20] Be that as it may, the Union's claim that the full-time Committeemen are actually current

[20] The UAW argues that the term "employee" has the same meaning in §302 as it does under the NLRA. UAW Br. at 20 n. 21. But *Pittsburgh Plate Glass* did not accept this argument. 404 U.S. at 170. The Court also held:

> [Retirees] were not and could not be "employees" included in the bargaining unit . . . Although those terms may include persons *on temporary or limited absence from work*, such as an employee on military duty, it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.

Id. at 172 (emphasis added).

Here, the full-time Committeemen are not on temporary or limited absence from work. Cir. App. at 168. As the Third Circuit held in *Trailways*, 785 F.2d at 107:

> There is a sound distinction between payments made to a union official who goes on *temporary* leave to conduct union business and then returns to *active* employment and payments on behalf of union officials who are on *full-time* leave but who may *never* return to full-time employment of his employer. (emphasis in original).

Caterpillar employees is most tellingly contradicted by its contention that its international representatives, who also worked for Caterpillar, *somehow are not*. UAW Br. at 5. Under Articles 14.10 and 14.11 of the Central Agreement, an employee who is elected or appointed to a position with the Union is granted an unpaid leave of absence for the period of such service. J.A. at 36-38. For example, UAW International Representative Jay Roberts, Local 786's former president, and a former Caterpillar employee, testified that he is an employee of the UAW—not Caterpillar, Cir. App. at 452, despite the fact that he is on leave of absence from the Company and, under 14.6, 14.10 and 14.11 of the Central Agreement, continues to accrue seniority and can return to Caterpillar, if and when his appointment is ended. J.A. at 35-38.

Like the international representatives, full-time committeemen are full-time employees of the Union. They are issued paychecks by the Union, Cir. App. at 617; they work exclusively for the Union; the Union determines their tenure; and they perform their services for the Union's benefit. Cir. App. at 173-74, 176-79, 183-90, 617-21; J.A. at 3-10; Discovery Materials in Support of UAW's Motion for Summary Judgment, Exh. B at 2-3, 4-7. Therefore, just as the international representatives on leaves of absence from Caterpillar are not current Company employees, neither are the full-time Committeemen. Conversely, *if* the Union's interpretation of § 302(c)(1) is correct, then an employer, like Caterpillar, could also agree, or be *compelled* to agree, to pay the wages of international representatives, business agents or union presidents on leave of absence on the theory that they too are current [or former] employees paid "by reason of" their "service as current or former employees." UAW Br. at 20.

CONCLUSION

The "practice" of paying full-time union agents to serve in representational capacities under the guise that they are "current" or "former" employees has stretched § 302(c)(1) beyond all recognition. The instant case may represent its most extreme expression when one considers that the full-time agents in question were based *outside* the work place and were paid virtual full-time salaries to perform *all functions* related to their offices with only certain limited exceptions. It is time to draw the line. Otherwise, the slippery slope will keep employers and unions sliding toward the abyss. Notwithstanding the AFL-CIO's fear that members "are unlikely to vote to tax themselves . . . in the form of higher dues payments to finance the cost of in-plant representatives," AFL-CIO Br. at 20, that *should be* the members' decision. Members should pay for union officials, if they so choose, through members' dues dollars, *not* hidden taxes on the wages of all employees.

The decision of the Third Circuit should be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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